# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-720

GASPARE DIGIORGIO, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The judgment of the district court was affirmed by the court of appeals without opinion (Pet. App. 1a-2a). The opinion and decision of the district court (Pet. App. 3a-12a) are reported at 372 F. Supp. 1373.

### JURISDICTION

The judgment of the court of appeals was entered on October 9, 1974. The petition for a writ of certiorari was filed on December 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a joint tortfeasor with the government in injuring a federal employee is barred from suing the government for contribution or indemnity because the Federal Employees' Compensation Act is the exclusive remedy for injured employees.

## STATUTE INVOLVED

5 U.S.C. 8116(c) provides:

> The liability of the United States or any instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However this subdivision does not apply to a master or a member of a crew of a vessel.

## STATEMENT

This case arose out of a collision between a United States government vehicle (driven by its employee, Robert Cooper, accompanied by plaintiff Robert Sheridan, also a government employee) and a truck which was owned by LPI Transport Corp. and driven by Gaspare DiGiorgio in the business of Pepsi-Cola, Inc. (DiGiorgio, LPI and Pepsi-Cola are petitioners herein.) Sheridan sued petitioners in the Supreme Court of the State of New York,

contending that his injuries were caused by DiGiorgio's negligence. Petitioners in turn brought a third party action against both Sheridan and Cooper for indemnity, alleging that their negligence was the sole cause of the accident. Since the government employees were acting in the course of their employment, the action was removed to the United States District Court for the Eastern District of New York, and the United States of America substituted for them, pursuant to 28 U.S.C. 2679. Petitioners' third party action thereafter proceeded as an action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b). Petitioners contend that they are entitled to apportionment of damages among joint tortfeasors under *Dole* v. *Dow Chemical Corp.*, 30 N.Y. 2d 143, 331 N.Y.S. 2d 382, 282 N.E. 2d 288 (Pet. 10).

The United States defended on the grounds that the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. 8116(c), is the exclusive remedy against the United States for damages growing out of injury to a federal employee. Petitioners moved to strike this defense, and the United States applied, pursuant to Rule 12(d), Fed. R. Civ. P., for the district court to hear and determine that defense. The court then dismissed the third party action.

The district court first determined that since the government's immunity from suit was federally created, "the dimensions of that exemption must be measured by federal rather than state standards" (Pet. App. 6a). The court carefully considered the federal case law, and concluded that (Pet. App. 7a-8a):

> A third-party action cannot be used as a vehicle to circumvent the statutory intent of limiting the Government's liability to the amount scheduled under

> FECA. If the rule were otherwise, the Government's immunity would be illusory, evaporating the instant that another wrongdoer could be found and brought in as a defendant.

The court also noted that (Pet. App. 8a):

> Contribution was designed to obviate the inequity of permitting an injured plaintiff to select by whim or caprice a single defendant, from among several common joint tortfeasors, to shoulder the entire burden of liability. This danger is no longer present, however, where one of two joint tortfeasors is immune from suit.

The court of appeals unanimously affirmed the judgment of the district court without opinion (Pet. App. 1a-2a).

**ARGUMENT**

1. The district court correctly interpreted the FECA to preclude government liability to joint tortfeasors in the case of injury to government employees, in the absence of an express or implied contract between the government and the third party plaintiff.[1] The FECA, while providing for liability to government employees without fault, was intended to be exclusive and to replace "any and all other legal liability of the United States * * * which can be enforced by original proceeding * * *." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23. See also

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[1]As the district court held, the extent of government immunity to liability created by federal statute should be governed by federal law. See *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 346-347 (C.A. 1); *Travelers Ins. Co.* v. *United States*, 493 F.2d 881 (C.A. 3). Petitioners' argument based on the New York Court of Appeals' interpretations of the New York State Workmen's Compensation Law (Pet. 8-10) is therefore without merit.

H. Rep. No. 729, 81st Cong., 1st Sess., pp. 5, 15. It would be inconsistent with this purpose to permit recovery from the government whenever the employee can also sue a non-government joint tortfeasor. Yet that would be the result of permitting suits against the government for indemnity or contribution in government employee cases of this kind.[2] In addition, the very purpose of a contribution remedy—to alleviate the inequity of permitting a plaintiff to place the entire loss on one among several joint tortfeasors—supports precluding contribution from a party who is immune and could therefore not have been sued in the first place.[3] See *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 347 (C.A. 1).

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[2]Petitioners rely in part on *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, which held that the divided damages rule in mutual fault maritime collisions was unaffected by the exclusivity provision of the FECA. However, the Court in that case relied on the contract-like clarity of the divided damages rule, which had been held previously to prevail over statutory provisions limiting liability. 372 U.S. at 603-604. The lower courts have for the most part interpreted *Weyerhaeuser* to apply only to maritime collision cases. See, *e.g.*, *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951; *Travelers Ins. Co.* v. *United States*, 493 F.2d 881 (C.A. 3); *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (C.A. 1); *Murray* v. *United States*, 405 F.2d 1361 (C.A. D.C.). But see, *e.g.*, *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (C.A. 4), certiorari denied, 398 U.S. 958.

In addition, this Court has recently interpreted *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282, to stand for the proposition that the exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) (which is almost identical to the exclusivity provision of the FECA) precluded a contribution recovery against the employer. *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 112-113.

[3]Different considerations apply of course where there is an express or implied contract of indemnity between the third party plaintiff and the third party defendant. In such a case, indemnity has been allowed against the employer in LHWCA cases. *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124.

2. Contrary to petitioners' suggestions (Pet. 12-13), there is no conflict among the circuits involving facts similar to this case, where no prior relationship or duty existed between the government and the party seeking indemnity or contribution. There is an apparent conflict as to the scope of the protection afforded the government by the FECA where such a prior relation may have existed.[4]

As the district court correctly observed, the "nexus existing between [petitioners] and the Government here arises solely from the circumstances of the accident itself" (Pet. App. 10a). Thus, the duty which petitioners seek to impose upon the government does not arise from any independent legal relationship; it would arise, if at all, simply from the joint acts of negligence to the federal employee at the time of the accident. In such circumstances, petitioners' right of recovery would derive directly from the right, if any, of the injured federal employee to recover in an action against the government, a right specifically foreclosed here by the FECA.[5] Petitioners cite no federal authority, and we have found none, permitting

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[4]Compare, *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (indemnity precluded); *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (C.A. 9), certiorari denied, 389 U.S. 940 (indemnity precluded); and *Travelers Ins. Co.* v. *United States*, 493 F.2d 881 (C.A. 3) (indemnity ~~permitted~~ precluded); with, *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (C.A. 4), certiorari denied, 398 U.S. 958 (indemnity permitted); and two decisions involving armed forces personnel prevented from suing the government by *Feres* v. *United States*, 340 U.S. 135, rather than by the FECA; *Wellington Transportation Co.* v. *United States*, 481 F.2d 108 (C.A. 6) (indemnity permitted); and *Barr* v. *Brezina Const. Co.*, 464 F.2d 1141 (C.A. 10), certiorari denied *sub nom. Brezina Const. Co.* v. *United States*, 409 U.S. 1125 (indemnity permitted; dictum).

[5]As noted *supra*, n. 1, the issue of the scope of protection afforded the government by the FECA is a question of federal law, as is whether petitioners' claim is sufficiently independent of the claims of the federal employee to avoid the express immunity provided by the FECA. See *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 346-347 (C.A. 1).

indemnity or contribution to be imposed against the United States absent some prior relation or duty to the joint tortfeasor. There is thus no conflict, and no occasion for further review.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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